IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/10/2003

CORAM

THE HONOURABLE MR. JUSTICE E. PADMANABHAN

W.P. NO. 17233 of 2003
and W.P.Nos. 18033, 18093, 18112 TO 18115, 18248 TO 18250, 18269 TO 18272, 18553 TO 18558, 18913 TO 18917, 18962 TO 18966, 19119 TO 19 120, 19298, 19310, 19311, 19362, 19692 TO 19700, 19634 TO 19637, 1984 8 TO 19850, 19853, 19863 TO 19867, 20050, 20060 TO 20062, 20244, 2025 5, 20258, 20309 TO 20313, 20332, 20333, 20335, 20418 TO 20421, 20541, 20547, 20548, 20549, 20617 TO 20621, 20937, 21008, 21009, 21023 TO 2 1028, 21031, 21061, 21101, 21159, 21259, 21295, 21299, 21300 , 21301, 21310, 21354, 21366 TO 21368, 21904, 21955 TO 21957, 21964 TO 21969, 21985, 22030 TO 22034, 22043, 22044, 22046 TO 22050, 20431, 20432, 2 0693, 20724, 20927, 21036, 21082, 21083, 21106, 21108 TO 21111, 21144 TO 21148, 21176, 21227, 21271, 21273, 21290, 21422, 21423, 21486, 21 530, 21588, 21589, 21590, 21591, 21592 TO 21594, 21674, 21669, 21747, 21816, 21707, 21708, 21937, 21933, 21812 TO 21814, 21928, 21892, 217 12, 21713, 21949, 22084 TO 22086, 22111, 22116, 22113, 22125, 23862 TO 23864, 23919, 23950, 23976, 23977, 24095, 24096, 24102 TO 24106, 22 377 TO 22390, 22467 TO 22475, 22500, 22564, 22580, 22595 TO 22600, 22 706, 22708, 22722, 22751 TO 22753, 22778 TO 22793, 23505 TO 23507, 23 556 TO 23565, 23577, 23639, 23642, 23741 TO 23743, 22249, 22250, 2227 5 TO 22277, 22298, 22306 TO 22308, 22311, 22313, 22370, 22351 TO 2235 4, 22809, 22810, 22824, 22844, 22866, 22881, 22885, 22134 TO 22136, 2 2159 TO 22162, 22183, 22204, 22218, 22231, 22251 TO 22253, 22266, 226 02, 22610 TO 22613, 22623 TO 22629, 22672 TO 22676, 22698, 22886, 22 887 TO 22889, 22890, 22894 TO 22897, 22912, 22913, 23156, 23280 TO 23 283, 23233 TO 23239, 22959, 22956 TO 22958, 24860 TO 24863, 25143 TO 25146, 25483, 25748, 24796 TO 24801, 23791, 23797, 23806, 23826, 2389 3 TO 23896, 23972, 24786 TO 24790, 24791 TO 24795, 24829, 24853, 2485 8, 24516, 24167, 24397 TO 24401, 24459 TO 24463, 24477 TO 24479, 2458 8 TO 24590, 24637, 24701, 24781 TO 24785, 23265, 23243 TO 23247, 2325 1, 23252, 23257 TO 23263, 23007, 23008, 23012, 23022, 23268 TO 23274, 23278, 23279, 23511 TO 23514, 23359, 23386, 28885, 23406, 23409, 234 27, 23454, 23474 TO 23481, 19521, 19676, 19983, 19984, 21041, 21586, 21587, 22952 TO 22955, 23068, 23352, 23366, 23573, 23739, 23962, 2272 9, 22734, 23376, 23377, 24363, 24367, 24368, 29984, 24617, 24872, 249 86 TO 24989, 25121, 25122, 25140 TO 25142, 25302 TO 25305, 25461, 256 03 TO 25604, 25950, 26270, 25087, 25088, 25094, 25101, 25102, 20733 TO 20735, 21044 TO 21048, 21049 TO 21052, 21060, 21355, 21362, 21363, 21448, 21449, 21452, 21487 TO 21491, 21601, 21602, 21424, 21425, 2147 7 TO 21483, 21545, 21799, 21806, 21807, 21820, 21821, 21840, 21875, 2 1876, 21877, 21852 TO 21856, 21857 TO 21862, 21879 TO 21882, 21942, 2 1943, 22051 TO 22055, 22056 TO 22058, 21647, 21755, 21756, 21780, 217 81, 21788 TO 21793, 21798, 19617, 22573, 20834, 21001 TO 21005, 21094 , 21105, 21435, 21519, 21520, 25995 TO 25997, 26133, 26201 TO 26206, 26442 TO 26446, 26518, 26519, 26645, 26677 TO 26680, 26858, 26866 TO 26870, 20534, 23360, 22960 TO 22697, 23979 TO 23982, 24030, 24031, 24 971 TO 24973, 26212 TO 26217, 26223 TO 26228, 26229 TO 26233,

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32093, 32100 TO 32104, 32457, 26573, 31360, 32798, 31364 AND 32908 OF 2003

W.P. NO. 17233 OF 2003

J.K. Pharmachem Limited
SIPCOT Industrial Complex
Cuddalore 607 005, rep. by
its Sr. G.M. (Finance & Accts.)
& Company Secretary
G.Ranganathan .. Petitioner

-Vs-

1. The State of Tamil Nadu
rep. by its
Secretary to Govt.
Energy Department
Fort St. George
Chennai 600 009.

2. Tamil Nadu Electricity Board
rep. by its Chairman
800, Anna Salai
Chennai 600 002.

3. The Chief Electrical Inspector
to Government
Thiru.Vi.Ka. Industrial Estate
Guindy, Chennai 600 032.

4. The Tamil Nadu Electricity
Regulatory Commissioner
17, III Main Road
Seethammal Colony
Alwarpet, Chennai 600 018. .. Respondents

Petitions filed under Article 226 of The Constitution of India praying
this Court to issue a Writ of Declaration as stated therein.

For Petitioners : Mr. R.Krishnamurthi, SC
Mr. R.Thiagarajan, SC, for
Mr. R.S.Pandiyaraj
Mr. Sriram Panchu, SC, for
Mr. N.L.Rajah
Mr. Palani Selvaraj
Mr. Vijay Narayan
Mr. P.S.Raman
Mr. C.S.Krishnamoorthy
Ms. Rita Chandrasekaran

For Respondent : Mr. N.R.Chandran, AG
assisted by
Mr. K.Raghupathi, Spl. G.P.
Mr. P.P.Shanmuga Sundaram, GA
Mr. N.Srinivasan
Mr. G.Vasudevan
Mr. K.S.Natarajan

:COMMON ORDER

1. The validity of The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, is the subject matter of challenge in these batch of writ petitions by the consumers, either individually or by association or by corporate sectors, as the case may be.

2. At the outset it has to be pointed out that no one has challenged the constitutional vires of the Act, but the challenges are on the periphery. Innumerable contentions were advanced by various learned senior counsel and they will all be considered one by one.

3. The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 , hereinafter referred to as The Tamil Nadu Act 12 of 2003 is an Act of the Tamil Nadu Legislative Assembly. The preamble to the Act reads thus :- "An Act to consolidate and rationalise laws relating to the levy of taxes on consumption or sale of electricity in the State of Tamil Nadu."

4. The Act received the assent of the Governor on 17.5.03 and was published on 19.5.03 in the Gazette. The Tamil Nadu Tax on Consumption and Sale of Electricity Rules, 2003, have been framed in exercise of powers conferred by Section 15 of the Act and it was also published on 16.6.03.

5. Section 2 is the definition section. Section 3 is the charging section. In terms of Section 3, every licencee and other person other than licencee shall pay every month to the Government a tax on the electricity sold or consumed at the rate specified in the said section. In the case of licensees other than captive generating plants, the rate of tax shall not be less than 5% and not more than 10% of the net charge as may be notified by the Government. In the case of licensees, who are captive generating plants, the rate of tax shall not be less than 10 paisa and not more than 20 paisa per unit of electricity on the consumption for own use and shall not be less than 5% and not more than 10% of the net charge on the sale of surplus electricity, as may be notified. In the case of a person other than a licencee, the rate of levy shall be not less than 10 paisa and not more than 20 paisa per unit of electricity on the consumption for own use as may be notified.

6. Factually, the State Government have notified that rate of tax on the electricity sold by the licensees other than captive generating plants at 5% on the net charge by notification dated 13.6.03. The State Government has notified that the tax shall be on the surplus electricity sold by the licensees, who have captive generating plants as defined under Section 2 (2)

of the Act, shall not be less than 5% and not more than 10% on the net charge and in case of persons other than licensees, it shall be not less than 10 paisa per unit and not more than 20 paisa per unit in the case of licensees, who have captive generating plants.

7. Section 4 exempts the sale of energy for consumption to Government, local authority or railway company. Section 5 directs registration of persons, who have installed or propose to install generating plants for generation of electricity for own consumption. Section 6 provides that licencee may with the previous sanction recover from any person or class of persons to whom electricity is sold, the electricity tax, which is to be paid by the licencee in respect of electricity so sold. An explanation is added to Section 6, which provides that the electricity tax recoverable from any person under Section 6 shall not be deemed to be part of the energy charges charged by the licencee. Section 7 provides for recovery of electricity tax. Section 8 obligates the licencee to keep books of accounts and submit return. Section 9 provides for assessment. Section 10 provides for appeal. Section 11 provides for payment of interest in case of belated payment. Sections 12 and 13 provides the appointment of electricity tax inspecting officers and confer powers on them. Section 14 provides for exemption and reduction of tax. Section 15 confers powers on the State Government to frame rules. Sections 17, 18 and 19 provides for offences, compensation and protection to action taken in good faith and penalties. Section 20 provides for repeal and savings. Section 21 directs that the provisions of the Act shall have the effect subject to the provisions of Article 288 of The Constitution.

8. From the contentions advanced, the following points arise for consideration in these batch of writ petitions:-
"I) Whether The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 is ultra vires and unconstitutional ?
II) Whether the levy under Tamil Nadu Tax on Consumption or Sale of Electricity is invalid and unenforceable for want of prior consent in terms of Art. 288 (2) of The Constitution ?
III) Whether levy of tax under The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, in respect of captive generation is illegal and invalid ?
IV) Whether the levy of tax on maximum demand charges is valid and enforceable ?
V) Whether the impugned levy of Tax on Sale or Consumption is violative of Art. 14 of The Constitution ?
VI) Whether various exemption granted under The Tamil Nadu Electricity (Taxation on Consumption) Act, 1962, holds good and valid even after the repeal of the said Act under Section 20 of the Act 12 of 2003 ?
VII) Whether the levy under Section 3 of The Tamil Nadu Act 12 of 200 3 amounts to double taxation and, hence, illegal and unenforceable ?
VIII) To what relief, if any ?"

POINT - I : Whether The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 is ultra vires and unconstitutional ?
9. Taking up the constitutional validity and legislative competency, it has

to be stated that there is no dispute that the said legislative enactment falls under Entry 53 of List II in Schedule VII of The Constitution. The Entry reads thus :-
"53. Takes on the consumption or sale of electricity."

10. The language used in the legislative entries in the Constitution, it is well accepted legal interpretation, must be interpreted in a broad way so as to give the widest amplitude of power to the Legislature to legislate and not in a narrow and pedantic sense. (See JIYAJEERAO COTTON MILLS LTD. VS. STATE OF M.P. - AIR 1963 SC 414).

11. Section 3 of the Act is the charging section. It is not disputed by the learned senior counsel appearing for the petitioners that under Section 3, the consumer of electrical energy is made liable to pay duty for the units of electrical energy consumed by itself. In the pronouncement of the Supreme Court in JIYAJEERAO COTTON MILLS LTD. VS. STATE OF M.P. reported in AIR 1963 SC 414, identical levy of tax on consumption or sale of electricity by the Central Province and Berar Electricity Duty Act, 1949, falling under Entry 53 of List II Schedule VII has been upheld by the Supreme Court.

12. Indisputably the title of the Act and the charging section employ the words "Tax on Consumption or Sale of Electricity". Under Article 246 (3) of The Constitution, the State Legislature has explicit power to make law for the State with respect to matters enumerated in List II of the VII Schedule to The Constitution.

13. The authority of the State to impose tax is derived from the Constitution. The entries in the List II to the VII Schedule are fields of legislation and the power is derived under Article 246 and other related Articles of The Constitution. In this case, there is no challenge with respect to the legislative competency of the State Legislature to enact the law. From the moment of consumption, consumption of electrical energy becomes sale and it is a tax on consumption and sale of electricity.

14. In view of the above legal position referred to hereinbefore, it has been rightly and fairly stated that the Act is not liable to be challenged as unconstitutional or ultra vires as not one falling within the legislative competency of the State. In fact, identical provisions have been sustained in INDIAN ALUMINIUM COMPANY & OTHERS VS. STATE OF KERALA reported in 1996 (7) SCC 637 and STATE OF U.P. VS. RENU SAGAR POWER COMPANY reported in 1988 (4) SCC 59.

15. In SWAROOP VEGETABLES PRODUCTS INDUSTRIES VS. STATE OF U.P. AND OTHERS reported in 1983 (4) SCC 24, in respect of U.P. Electricity (Duty) Act, 1952, where the charging section is inparimateria to the present charging section, a Full Bench of the Supreme Court sustained the constitutional validity of levy of electricity duty in respect of energy consumption by a person from his own sources of generation by affirming the Full Bench judgment of the Allahabad High Court. The Supreme Court held that the duty so chargeable in respect of energy consumed by a person from his own source of generation regardless of the fact that he also purchases electricity from some

other source. It may not be necessary to dwell further with respect to the legislative competency of the State to enact.

POINT - II : Whether the levy under Tamil Nadu Tax on Consumption or Sale of Electricity is invalid and unenforceable for want of prior consent in terms of Art. 288 (2) of The Constitution ?

16. Taking up the second point, Mr. R.Krishnamoorthy, learned senior counsel leading the arguments advanced the contention that no tax on electricity could be imposed by the State unless the Act has been reserved for the consideration of the President and received his assent. In other words, unless the previous consent of the President is obtained in making the law, the Act is unenforceable. The learned senior counsel heavily relied upon Article 288 (2) of The Constitution and also referred to Section 21 of the Tamil Nadu Act 12 of 2003, which reads thus :-

"The Act to be subject to Article 288 - This Act shall have effect subject to the provisions of Article 288 of The Constitution."

17. According to the learned senior counsel, the Act has not been reserved for the consideration of the President nor it has received the assent of the President. Therefore, the Act, insofar as it levies tax on electricity is unenforceable. This contention advanced requires to be examined.

18. Article 288 (2) is heavily relied upon. Article 288 reads thus :-

"(1) Save insofar as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any interState river or river-valley.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order."

19. Per contra, it is contended that Art.288 has no application at all. It is pointed that Art.288 is a special provision insofar as either the electricity is stored, generated or consumed or distributed by inter-state river or river valley authority established by any existing law or any law made by the Parliament and therefore there could be a levy of electricity tax either on sale or consumption in the State by virtue of the State's taxing power in respect of electricity generated or distributed by any other authority either the supplier or consumer. None of the petitioners belong to the category of River Valley Project constituted by Parliament.

20. Art.288 falls under the heading "Miscellaneous Financial

Provisions" in The Constitution. Art.285 provides for exemption of property of the Union from State taxation. Art.286 provides for restriction as to the imposition of tax on the sale or purchase of goods by States. Art.287 provides for exemption from tax on electricity. Art.287 provides that no law of the State shall impose or authorise imposition of tax on the consumption of sale or electricity which is consumed by the Government of India or sold to the Government of India, for consumption by that Government or sold in the construction, maintenance or operation by Railways or sold to the Government, such Railway company for consumption in the construction, maintenance or operation by any railways.

21. Art.288 provides for exemption from taxation by States in respect of water or electricity in certain cases. The certain cases being such sale of water, electricity by inter-state river or river valley authority constituted by any existing law or any law made by Parliament. If we read Art.288 in the context of Art.287, the contention advanced by the learned Senior Counsel is hard to sustain. This is an exemption and it has to be constructed strictly as well. Art.288(2) has to be read strictly as it is a provision of exemption from levy in favour of the special category namely inter-state river or river valley authority constituted by an Act of the Parliament. If such generation or distribution of electricity or water is by such inter-state river or river valley authority, then only Art.288 would apply and not in any other case. This Article is a special provision.

22. In DAMODHAR VALLEY CORPORATION VS. STATE OF BIHAR & OTHERS reported in 1976 (3) SCC 710, the said Damadhar Valley Corporation preferred an appeal before the Supreme Court as against the judgment of the Patna High Court dismissing the writ petition filed by it, established under The Damodhar River Valley Corporation Act, 1948 for the development of Damodhar Valley in the States of Bihar and West Bengal. One of the functions of the said Corporation being generation, transmission and distribution of hydro-electric and thermal electric energy. The State of Bihar imposed duty on electricity by Bihar Electricity Duty Act, 1948. The said Act came to be amended by Amendment Act, 19 63 which was reserved for the consideration of The President and received the assent as well. However, Damodhar Valley Corporation challenged the proceedings initiated under the Act. The High Court repelled the contention advanced by the Damodhar Valley Corporation contending that the said Valley Corporation enjoyed immunity from payment of tax under Clause (1)

of Art.288 of the Constitution. Factually the amending Act has received the assent of The President. In that context the scope of Art.288 was considered by the Supreme Court.

23. The Supreme Court held that Art.288 grants exemption from tax under any law of the State in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-state river or river valley. Though under the principal Act the Damodhar Valley Corporation enjoyed exemption as an inter-state river valley authority, but after the Amending Act, 19 63, the proceedings were initiated.

The Amending Act satisfied the requirement of Clause (2) of Art.288. In that context the Supreme Court examined Art. 288 and held thus :-

"5. Article 288 grants exemption from tax under any law of a State in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any interState river or river-valley, except in certain cases. According to clause (1) of the article, this exemption would not be available in respect of such tax imposed under any law of a State in force immediately before the commencement of the Constitution if the President by order so provides. .....
9. What is required by clause (2) of Article 288 is that the law made by the State legislature for imposing, or authorising the imposition of tax mentioned in clause (1) shall have effect only if after having been reserved for the consideration of the President it receives his assent. Another requirement of that clause is that if such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of The President being obtained to the making of any such rule or order. It is, however, not the effect of that clause that even if the above mentioned two requirements are satisfied, the provisions which merely deal with the mode and manner of the payment of the aforesaid tax should also receive the assent of the President and that in the absence of such assent, the provisions dealing with the incidence of tax, which have received the assent of the President, would remain unenforceable."

24. A passage in STATE OF ANDHRA PRADESH VS. NTPC reported in 2002 (3) Supreme Today, page 400 was relied upon by the learned Senior Counsel Mr.R.Krihsnamurthy. But in that decision, the Supreme Court had no occasion to deal with such a contention. But one of the contention was advanced by the State of Andhra Pradesh placing reliance on Art.287 and Art.288. In that context, the Supreme Court pointed out that Art.287 and Art.288 makes provision in the special context dealt by those Articles. The Supreme Court held thus:-

" 33. .... This submission is stated only to be rejected. These articles make some provisions for electricity and water or electricity in the special context dealt with by those articles and do not exclude applicability of other articles where electricity has been dealt with as goods." (emphasis supplied)

25. Read from the context of the Art.288 which is placed in the constitutional provisions and being an exemption in favour of an Interstate river or River Valley Authority established by an Act or Parliament for regulating or developing any inter-state river or river valley that exemption provision has to be read in that context and in terms of the very Article. If we read in that context, the levy is only in respect of sale, storage, generation or consumption by a river valley or inter-state river valley corporation established by law made by Parliament alone is included and not other levies on electricity or water either generated or distributed by others. Even such levy is permissible if the President's assent is accorded. The enactment namely The Tamil Nadu Taxation on Consumption or Sale of

Electricity is not an enactment imposing duty or tax on electricity stored, generated, consumed or distributed by any inter-state river or river valley authority established by an Act of Parliament. None of the petitioners belong

to that category of inter-state river valley corporation established by an Act of Parliament to claim the protection under Art.288 of The Constitution. The contention advanced cannot be countenanced and it fails.

POINT - III : Whether levy of tax under The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, in respect of captive generation is illegal and invalid ?

26. In interpreting the Tamil Nadu Act, whose primary object is to raise revenue and for which purpose the Act classify the connections and the technical meaning of the terms or expressions used should be understood with the meaning attached to them by those dealing in them. In CHIRANJIT LAL ANAND VS. STATE OF ASSAM reported in 1985 Supp. SCC 392 = AIR 1985 SC 1387, the Supreme Court held thus :-

"11. It is well-settled that in interpreting items in statutes like the Sales Tax Acts whose primary object is to raise revenue and for which purpose they classify diverse products, articles and substances, resort should be had not to the scientific and technical meaning of the terms or expressions used but to their popular meaning i.e. the meaning attached to them by those dealing in them. (emphasis supplied). If any term or expression has been defined in the enactment then it must be understood in the sense in which it is defined. But in the absence of any definition being given in the enactment, the meaning of the term in common parlance or commercial parlance has to be adopted. See the observations of this Court in Indo International Industries Vs. CST, and also in the case of His Majesty the King Vs. Planters Nut and Chocolate Co. Ltd. (which decision was approved by this Court in CST Vs. Jaswant Singh Charan Singh)."

27. In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing has to be read into, nothing has to be implied. One can only look fairly at the language used in the Act. In STATE OF PUNJAB VS. JALANDHAR VEGETABLE SYNDICATE reported in AIR 1966 SC 1295, in para-5, the Supreme Court held thus :-

"It is a settled rule of construction that in interpreting fiscal statue, the Court cannot proceed to make good the deficiencies, if there be any, in the statute ; it shall interpret the statute as it stands, and in case of doubt, it shall interpret it in a manner favourable to the tax payer. Insofar as the interpretation in regard to fiscal statute is concerned, there is no scope for any doubt."

28. In STATE OF U.P. & OTHERS VS. RENUSAGAR POWER COMPANY LTD. & OTHERS reported in 1988 (4) SCC 59, while considering the provisions of the U.P. Electricity Duty Act, 1952, which is imparimeteria with the Tamil Nadu Act, the Supreme Court upheld the validity of levy of tax in respect of own generation. The charging section confers power on the State Government to fix

the the maximum or minimum rate of duty and it has also the power to grant exemption in some case. The exercise of power by the State Government in fixing the schedule of rates of taxes is in the nature of subordinate legislation and it is in conformity with the provisions of the Act. The exercise of power, be it legislative or administrative will be liable to be set aside if it is manifestly arbitrary or erroneous or on a non-consideration or nonapplication of mind to relevant factors or based on facts, which do not exist. As seen from the provisions of the Act, all relevant factors were given consideration, but subject to public interest.

29. The Tamil Nadu Electricity (Taxation on Consumption) Act 4 of 196 2, has been repealed by the present enactment. The earlier enactment, which was in force uptil now was the subject matter of consideration before the Supreme Court in VIRUDHUNAGAR STEEL ROLLING MILLS LTD. VS. GOVERNMENT OF MADRAS reported in AIR 1968 SC 1196. The 1962 Act was passed by the Legislature by which tax was imposed on the consumption of energy both to HT and LT electricity for various purpose at varying rates. Section 12 of the 1962 Act was the subject matter of challenge as violative of Article 14. A single Judge of the High Court dismissed the writ petition without issue of notice. The Division Bench on a Letters Patent Appeal repelled the contention that Section 12 insofar as it did not provide for exemption in favour of undertakings like the petitioners was arbitrary. Thereafter, the petitioners therein moved the Supreme Court. The Supreme Court affirmed the view taken by the Division Bench of this Court and held that Section 12 proviso is not discriminatory.

30. Section 3 (1) is covered by Entry 53 List II of the VII Schedule to The Constitution. Electricity generated by the very consumer and consumed in that very factory, in terms of the charging section, tax could be levied. This falls into Entry 53. En try 53 has to be given its widest amplitude as has been held by the Supreme Court in AIR 19 63 SC 414. In JIYAJEERAO COTTON MILLS LTD. VS. STATE OF M.P. reported in AIR 1963 SC 414, an identical provision in the Central Province and Berar Electricity Duty Act was questioned. Their Lordships of the Supreme Court held that the provision is covered by Entry 53 and the said pronouncement is on the point.

31. While interpreting Entry 53 of List II, the Supreme Court in J.C. MILLS VS. STATE OF M.P. reported in AIR 1963 SC 414 and while upholding the levy of duty on consumption of electrical energy, besides holding that the same cannot be regarded as duty to exercise falling within Entry 84 of List I in Schedule VII of The Constitution and held thus :-

"…. The relevant portion of that Entry reads thus:-
"Taxes on consumption or sale of electricity ….."
Entry 53 of List II of the Constitution is to the same effect. The argument of Mr.Sastri is that the word "consumption" should be accorded the meaning which it has under the various electricity Acts, including the Indian Electricity Act, 1910. Under that Act and under the various Provincial and State Acts, consumption of electricity means, according to him, consumption by persons other than producers and that both in the Government of India Act and under the Constitution the word "consumption" must be deemed to have been used

in the same sense. The Acts in question deal only with a certain aspect of the topic "electricity", and not with all of them. Therefore, in those Acts the word "consumption" may have a limited meaning as pointed out by learned counsel. But the word "consumption" has a wider meaning. It means also "use-up", "spend", etc. The mere fact that a series of laws were concerned only with a certain kind of use of electricity, that is consumption of electricity by persons other than the producer cannot justify the conclusion that the British Parliament in using the word "consumption" in Entry 48-B and the Constituent Assembly in Entry 5 3 of List II wanted to limit the meaning of "consumption" in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the Legislature to legislate and not in a narrow and pedantic sense."

In the light of the above discussions and law laid down by the Supreme Court, Point III is answered against the petitioners and in favour of the respondents.

POINT - IV : Whether the levy of tax on maximum demand charges is valid and enforceable ?

32. Section 79 of The Electricity Act, 1948, confers power to make regulations to provide for matters specified therein, inter alia, the matters specified include the principles governing the supply of electricity by the Board to persons other than licencees. Sub-Sections (2), (3) and (4) of Section 49 provides that in fixing uniform tariffs, the Board shall have regard to the nature of the supply, the purpose for which it is required, the co-ordinated development of the supply and distribution of electricity in the most efficient and economical manner, the implication and standardisation of methods and rates of charges for such supplies; the extension and cheapening of supplies of electricity to sparsely developed areas, etc. Sub-section (3) provides that the Board may, if it considers necessary or expeditious, fix different tariff rates for supply of electricity to any person not being a licencee having regard to geographical position of any area, the nature of

supply and the purpose for which supply is required and any other relevant factors. In exercise of power conferred by Section 79 read with Section 49 of the Act, regulations are framed.

33. In the present case, there is no complaint insofar as the levy of tax on actual consumption charges are concerned and the whole grievance is only about the maximum demand charges or demand charges as they are popularly called. It is the grievance that for demand charges levied and enforced by the Board, which is not being the actual consumption, no tax shall be levied is the substance of the contention.

34. Demand charges means that the charge leviable for the readiness of the supplier to meet the demands of the consumer. If the Board is ready and willing to supply, but the consumer does not consume, then obviously the liability would arise as the Board remains in readiness to supply energy and non-utilisation of the energy by the consumer does not affect the liability of the Board to keep the energy set apart for consumption.

35. In BIHAR STATE ELECTRICITY BOARD VS. GREEN RUBBER INDUSTRIES reported in 1990 (1) SCC 731, the Supreme Court justified the concept of minimum charges. Minimum charge was not really a charge, which fee it is based on consumption of electrical energy, but it is really based on the principle that every consumer installation involves licencing a certain amount of capital expenditure in plants and mains, on which he was to have a reasonable return. Such reasonable return is possible when the energy so actually consumed in the shape of payments of energy consumed. However, when any such energy so consumed by the consumer are in very small amount over a longer period, the licencee was allowed to charge minimum charges by his licence. This minimum charges were really interest on the capital outlay incurred for the particular consumer.

36. In NATESA CHETTIAR VS. MADRAS STATE ELECTRICITY BOARD reported in 1969 (1) MLJ 69, this Court held thus :-

"... the minimum fixed was only consideration for keeping the energy available to the consumer at his end; it was not a penalty for not consuming a stated quantity of energy but was a concession shown up to the amount fixed, energy at a specified rate could be consumed free, consumption beyond only had to be paid for. The statutory basis for the terms in the agreement providing for minimum annual charge was found in Section 22 of the Act and Section 48 of the Supply Act. Section 22 deals with obligation on licensee to supply energy. The proviso to the section says:
'No person shall be entitled to demand, or to continue to receive, from a licensee a supply of energy for any premises having a separate supply unless he has agreed with the licensee to pay to him such minimum annual sum as will give him a reasonable return on the capital expenditure, and will cover other standing charges incurred by him in order to meet the possible maximum demand for those premises, the sum payable to be determined in case of difference or dispute by arbitration.'
Section 48 of the Supply Act empowers the licensee to carry out arrangement under that Act."

The above view of the High Court has been approved by the Supreme Court.

37. The terms and conditions of supply of electricity as was originally framed defined the expressions "average demand", "permitted demand", sanctioned demand", contractual demand". The said condition provides for agreement to be executed. The clause in the agreement provides for payment of minimum monthly charges agreed to and the consumer is liable to pay current consumption charges or minimum monthly charges or fixed charges/special guarantee, if any, and other charges as provided under the tariff notifications.

38. In ORISSA STATE ELECTRICITY BOARD VS. IPI STEELS LTD. & OTHERS reported in AIR 1995 SC 1553, the collection of demand charges for the actual maximum demand availed by consumer has been held to be not arbitrary nor

unreasonable nor it is confiscatory. In this respect, the Supreme Court held thus :-

"The consumer governed by the two-part tariff is, however, obliged under the said regulation to pay "on the basis of actual energy consumption and the 'maximum demand' as provided in the agreement". Now, what does this mean in practice ? If the consumer avails of energy at half the maximum demand/contract demand, he will pay demand charges only for that. In other words, if the respondent had drawn energy at 3889 KVA, he would pay demand charges only for 3889 KVA plus the charges for the actual number of units consumer by him. Similarly, had the respondent availed of the energy at, say 3000 KVA he would have been liable to pay demand charges only on that basis plus the energy charges, and if he had availed of energy at maximum demand then he would have been liable to pay demand charges for the maximum demand availed by him plus the energy charges - the over-all restriction being that he should have remained within the fifty per cent quota prescribed. Thus, in no event, a consumer is made to pay maximum demand charges for more than what he actually availed. As stated above, the over-all limitation is that he must have remained within the fifty per cent quota allotted to him during the year of restriction. We are unable to see any arbitrariness or unreasonableness in the said proviso. It means and says that during such periods of restricted supply, the consumer pays the energy charges for the actual consumption plus maximum demand charges for the maximum demand availed of by him at the rate prescribed in the agreement."

39. In a recent pronouncement, M/S. RAYMOND LTD. VS. M.P. ELECTRICITY BOARD & OTHERS reported in AIR 2001 SC 238, the Apex Court held thus :-

"13. In Orissa SEB v. IPI Steel Ltd. this Court had an occasion once again to deal with these issues in the light of the earlier case-law on the subject. This Court explained therein the meaning of the expressions "maximum demand charges", "consumption charges" and dealt with the role as well as purpose of installing two meters - the normal meter meant for recording the total quantity of energy consumed over a given period, invariably a month and "trivector meter" meant for recording the highest level/load at which the energy is drawn over any thirty-minute period in a month. While explaining the two-part tariff system meant for big/bulk consumers of electricity, this Court has emphasised and reiterated the justification and reasonableness of the same, observing the following: (SCC p. 327, para 10)
"Normally speaking, a factory utilises energy at a broadly constant level. Maybe, on certain occasions whether on account of breakdowns, strikes or shutdowns or for other reasons, the factory may not utilise energy at the requisite level over certain periods, but these are exceptions. Every factory expects to work normally. So does the Electricity Board expect - and accordingly produces energy required by the factory and keeps it in readiness for that factory - keeping it ready on tap, so to speak. As already emphasised, electricity once generated cannot be stored for future use. This is the reason and the justification for the demand charges and the manner of charging for it. There is yet another justification for this type of levy and it is this: demand charges and consumption charges are intended to defray

different items. Broadly speaking, while demand charges are meant to defray the capital costs, consumption charges are supposed to meet the running charges. Every Electricity Board requires machinery, plant, equipment, sub-stations, transmission lines and so on, all of which require a huge capital outlay. The Board like any other corporation has to raise funds for the purpose which means it has to obtain loans. The loans have to be repaid, and with interest. Provision has to be made for depreciation of machinery, equipment and buildings. Plants, machines, stations and transmission lines have to be maintained, all of which require a huge staff. It is to meet the capital outlay that demand charges are levied and collected whereas the consumption charges are levied and collected to meet the running charges."

* * * * *

19. As a matter of general principle, any stipulation for payment of minimum guarantee charges is unexceptionable, in a contract of this nature wherein, the Board which undertakes generation, transmission and supply of electrical energy has to, in order to fulfil its obligation lay down lines and install the required equipment and gadgets and constantly keep them in a state of good repair and condition to render it possible for the consumer to draw the supply required at any and all times. These commitments are irrespective of the capacity of the Board to generate at a given point of time or during a relevant period the total quantum required for the consumption of all consumers of various categories or even during the days of breakdown envisaged or staggering necessitated on account of orders of the Government regulating the distribution and consumption of energy as well as during periods when for reasons personal or peculiar to the consumers or even beyond their control the consumption is not and could not be of the mutually-agreed extent. The Board undertakes to generate and supply energy, in public interest also at concessional rates of varying nature and it cannot be stated that the rates so fixed invariably are to meet the expenditure incurred by the Board for generation and supply of energy, to the last pie. Consequently, if either in the general conditions and terms of supply or the contract or the tariff rates as the case may be there is any stipulation, in clear and unmistakable terms that the liability relating to the payment of guaranteed minimum charge could or will be enforced irrespective of the actual consumption rate of the consumer or even dehors the capacity or otherwise of the Board to supply even the minimum of the contract demanded energy, there could be no valid objection in law for any such stipulation being made and the consumer will be bound to honour such commitment. The contract for the supply of electrical energy cannot be treated on a par with any other contracts of mutual rights and obligations, having regard to the peculiar problems involved in the generation, transmission and supply which invariably depend upon the vagaries of the monsoon as well as short supply to them of the required coal and oil in time and similar other problems over which the Board cannot have any absolute control. The recurring commitments relating to constant and periodical maintenance of supply lines and other installations cannot be anytheless even during such times and such onerous liabilities cannot be left to fall exclusively upon the Board and it is only keeping in view all these aspects, payment of minimum guaranteed charges is necessarily inbuilt in the tariff system of the Board and the reasonableness or legality of the same cannot be considered either in the abstract or in isolation of all these aspects. It is for this reason that all over the consumer is also made to share the

constraints on the Board's economy even during such periods. In fact the tariff inclusive of such a provision for payment of a minimum guaranteed sum irrespective of the supply/consumption factor appears to be the consideration for the commitments undertaken by the Board as a package deal and it is not possible or permissible to allow the consumer to wriggle out of such commitments merely on the ground that the Board is not able to supply at any point of time or period the required or agreed quantum of supply or even supply up to the level of the minimum guaranteed rate of charges. Tinkering with portions of contracts for any such reasons, merely on considerations of equity of (sic or) reasonableness pleaded for vis-□-vis one party alone will amount to mutilation of the whole scheme underlying the contract and render thereby the very generation and supply of electrical energy economically unviable for the Board. Consumers, who enter into such commitments openly and knowing fully well as these hazards involved in the generation, transmission and supply, will be estopped from going behind the solemn commitment and undertaking on their/its part under the contract. The High Court does not seem to have properly appreciated the ratio of the several decisions noticed except merely referring to them in extenso, and yet ultimately just arrived at a conclusion merely for the reason that the Court considered it to be "more equitable, just and reasonable" to do so."

40. Thus it is the well settled law that be it minimum demand or maximum demand, whatever it is, the charge payable by the consumer to the supplier and it is not the actual consumption, but so far as the levy of tax, in terms of Section 3, which is the charging section, it would be only on the basis of sale or consumption of the energy.

41. The electricity duty is chargeable on the price of energy supplied in a month. The price of energy in a two-part tariff system would mean and include energy charge as also the demand charge. Hence, the tax under the Tax Act is chargeable not only on the energy charged, but also on the demand charge and the supply is governed by the twopart tariff and it is chargeable on the actual amount of demand charge realized from the consumer.

42. There are two well known systems of tariffs, namely, (i) Flat Rate System and the other is known as (ii) Two-part Tariff System. In the first, a flat rate is charged on units of energy consumed. The latter system is meant for big consumers of electricity and it comprise of -
"(i) Demand charges to cover investment, installation and the standing charges to some extent ;
(ii) Energy charges for the actual amount of energy consumer."

43. Terms and conditions have been framed in exercise of power conferred by Section 49 of The Indian Electricity Supply Act, which defines the expression "demand charge" and "energy charge".

44. The point being -
"Whether any tax is chargeable on the demand charge, if so, to what extent ?"

45. In NORTHERN INDIA IRON & STEEL CO. LTD. VS. STATE OF HARYANA reported in AIR 1976 SC 1100, an identical contention was the subject matter

of consideration. The Apex Court held thus :-
"10. Coming to the question of duty, we have no hesitation in an outright rejection, of the extreme contention put forward on behalf of the appellants that no duty is liveable at all on the demand charge. But It is clear, and this was fairly conceded to by the Solicitor General appearing for the State of Haryana, that the amount of duty payable will be on the actual amount of demand charge realisable from the consumer after the proportionate reduction under clause 4(/) of the tariff.
11. Section 3 of the Duty Act says that there shall be levied and paid to the State Government on the energy supplied by the Board to a consumer a duty to be called the "electricity duty", computed at the rates indicated in the various clauses of sub-section (1) of Section 3. The expression used in the various clauses is "where the energy is supplied" to a particular type of consumer, then the rate of duty will be as specified therein. On the basis of the said expression the argument put forward on behalf of the appellant was that the duty could be levied only on the energy charges for the actual amount of energy supplied. Such an argument is too obviously wrong to be accepted. Reading the clauses as a whole it would be seen that the duty is chargeable on the price of energy supplied in a month. The price of energy in a two-part tariff system would mean and include the energy charge as also the demand charge. This is made further clear by the manner of calculation provided in Rule 3 of the Punjab Electricity (Duty) Rules, 1958. Sub-rule (1) says:
The duty under clauses (iii) and (iv) of sub-section (1) of Section 3 of the Act shall be calculated on the price of the energy recoverable at the net rate of the Board which will include the demand charge when the supply is governed by a two-part tariff."

46. In the present case also, the learned Advocate General appearing for the respondent made a statement at the time of hearing that the amount of duty payable will be on the actual amount of demand charge realizable from the consumer. In fact, in the written arguments also, the same stand has been reiterated. Therefore, this Court holds that duty is chargeable only on the amount of demand charge realizable from the consumer on the actual amount of demand charge.

POINT - V : Whether the impugned levy of Tax on Sale or Consumption is violative of Art. 14 of The Constitution ?
47. When a citizen wants to challenge the validity of any statute on the ground that it contravenes Article 14, it is well settled that there must be specific, clear and unambiguous allegations in that behalf and it must be established that the impugned statute is based on discrimination as not referable to any classification, which is rationale and which has nexus with the object intended to be achieved by the said statute. In this respect, it is useful to refer to the pronouncement of the Supreme Court in VSR & OIL MILLS VS. STATE OF A.P. reported in AIR 1964 SC 1781. In this respect, the Supreme Court held thus :-

"This Court has repeatedly pointed out that when a citizen wants to challenge the validity of any statute on the ground that it contravenes Art. 14, specific, clear and unambiguous allegations must be made in that behalf and it must be shown that the impugned statute is based on discrimination and that

such discrimination is not referable to any classification which is rational and which has nexus with the object intended to be achieved by the said statute. Judged from that point of view, there is absolutely no material on the record of any of the appeals forming the present group on which a plea under Art. 14 can even be raised. Therefore, we do not think it is necessary to pursue this point any further."

48. In Empire Industries Ltd. VS. Union of India reported in AIR 1986 SC 663, the imposition of tax by Legislature was challenged as violative of Art.14. In that context, the Supreme Court held thus:-

"49. Imposition of tax by legislation makes the subjects pay taxes. It is well-recognised that tax may be imposed retrospectively. It is also well-settled that that by itself would not be an unreasonable restriction on the right to carry on business. It was urged, however, that unreasonable restrictions would be there because of the retrospectivity. The power of the Parliament to make retrospective legislation including fiscal legislation are well-settled. (See M/s Krishnamurthi & Co. v. State of Madras.) Such legislation per se is not unreasonable. There is no particular feature of this legislation which can be said to create any unreasonable restriction upon the petitioners."

49. In Venkateshwara Theatre Vs. State of Andhra Pradesh reported in AIR 1993 SC 1947, the Apex Court while analysing the case law and taxation provision with reference to Art.14, the Supreme Court held thus:-

"20. Since in the present case we are dealing with a taxation measure it is necessary to point out that in the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. (See: East India Tobacco Co. v. State of A.P.(AIR 1962 SC 1733), P.M. Ashwathanarayana Shetty v. State of Karnataka (AIR 1989 SC 100), Federation of Hotel & Restaurant Association of India v. Union of India (1989) 2 SCR 918, Kerala Hotel & Restaurant Association v. State of Kerala (AIR 1990 SC 913) and Gannon Dunkerley and Co. v. State of Rajasthan (1993) 1 SCC 364.)"

50. In Kodar Vs. State of Kerala, reported in Vol.34 (1974) SC 73 at page 76, the Supreme Court while testing the validity of additional tax as infringing Art.19 (1)(g) and 19(1)(f), held thus:-

"9. As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. The object of the Act, as is clear from its provisions, is to increase the tax on the sale or purchase of goods imposed by Tamil Nadu General Sales Tax Act, 1959 and the fact that quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that additional tax is to be imposed only if the turnover of a dealer exceeds Rs 10 lakhs. It is in reality a tax on the aggregate of sales affected by a dealer during a year. The additional tax, e, is an enhancement in the rate of the sales tax when the turnover of a dealer

exceeds Rs 10 lakhs a year and it is a tax on the aggregate of -the sales affected by the dealer during the year. The decisions in Ernakulam Radio Company v. State of Kerala which was affirmed by a Division Bench of the Kerala High Court in Kuikar v. Sales Tax Officer took that view. The same view was taken by the Andhra Pradesh High Court in A.S. Ranachandra Ran v. State of Andhra Pradesh This is the correct view. Entry 54 in List II authorises the state legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis.
10. As regards the second contention that the provisions of the Act are violative of the fundamental rights of the appellants under Article 19(1)(f) and 19(1)(g), as the tax is upon the sale of goods and is not shown to be confiscatory, it cannot be said that the provisions of the Act impose any unreasonable restrictions upon the appellants' right to carry on trade. It is, no doubt, true that every tax imposed some restriction upon the right to carry on a business; but it would not follow that the imposition of the tax in question is an unreasonable restriction upon the appellants fundamental right to carry on trade. Generally speaking, the amount or rate of a tax is a matter exclusively within the legislative judgment and as long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness is outside the judicial ken."

51. In fact except making bald averments that the levy is expropriatory, no basis has been made as to how it is expropriatory. Levy of 4 per centum as additional tax on the fact is not expropriatory, nor it violates Art.14. There is nothing to show that the levy of 4 per centum is arbitrary. Hence, this point is also answered in favour of the respondents and against the petitioners. Hence, this Court holds that Point V also fails and it is rejected.

POINT VI : Whether various exemption granted under The Tamil Nadu Electricity (Taxation on Consumption) Act, 1962, holds good and valid even after the repeal of the said Act under Section 20 of the Act 12 of 2003 ?
52. Let us take the next point for consideration. A statute, after its repeal is completely obliterated as if it had never been enacted. The effect is to destroy all integrated rights and all cause of action that may have arisen in the repealed statute as has been held by the Supreme Court in KESHAVAN MADHAVA MENON VS. STATE OF BOMBAY reported in AIR 1951 SC 128.

53. There is a saving of rights and liabilities by virtue of the saving provision under the Act. The saving clause under the new Act is comprehensively worded and it is detailed besides it is exhaustive. The saving clause, namely, clause (a) of sub-section (2) of Section 20 , which is relevant, reads thus :-

"(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection order or notice made or issued or any direction given under the repealed laws, shall so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act."

54. By placing reliance upon the said saving clause, it is sought to be contended that earlier notification of exemption granted in favour of specified industries or captive generation or by user of such specified raw material in captive generation, it is contended that relaxation will hold good unless it is withdrawn by another notification. This contention overlooks the fact that the saving clause just provides that if there is any inconsistency with the exemptions already granted with the provisions of the Act, then such a contention cannot be countenanced. The earlier exemption provision in the repealed enactment is Section 13. Clauses (a), (b) and (c) of Section 13 (1) reads thus :-

"The Government may, by notification, make an exemption or reduction in rate, in respect of the electricity tax payable under this Act by any specified class of persons, having regard to all or any of the following matters, namely :-
(a) the nature of the business or industry carried on by such class of persons ;
(b) the price of energy consumed in relation to the total cost of the manufacture or production of the principal product in any industrial undertaking owned or controlled by such class of persons ;
(c) such other matters as may be prescribed."

55. The present provision, which enables the State to grant exemption is Section 14 of the New Act, which reads thus :-

"14. Exemption and reduction of tax - The Government may by notification, make an exemption or reduction in rate in respect of the electricity tax payable under this Act on electricity sold for consumption by or in respect of any --
(i) institution or class of persons ;
(ii) place of public worship, public burial or burning ground or other place for the disposal of the dead ;
(iii) premises declared by the State Government to be used exclusively for purposes of public charity ;
(iv) vessel whether seagoing or inland."

56. A reading of the said two exemption provision would show that exemption already granted under Section 13 of the old Act are inconsistent with Section 14 of the new Act and, therefore, they cannot be continued at all. There being inconsistency, the claim of the counsel that the earlier exemption still holds good till it is withdrawn cannot be countenanced and such a contention has to be rejected. Though the learned counsel for the petitioners and the respondent referred to a number of authorities, it is not necessary to refer to the same as on the very reading of the repeal and saving provision contained in the new Act, the legal position is clear. Hence, this contention deserves to be rejected.

POINT VII : Whether the levy under Section 3 of The Tamil Nadu Act 12 of 2003 amounts to double taxation and, hence, illegal and unenforceable ?
57. It is being vehemently contended by the learned counsel appearing for the petitioners that levy of electricity tax on consumption or sale is a

double taxation and, therefore, it is invalid and unenforceable. In the 1962 Act, tax was levied. Subsequently, at a particular point of time, as per G.O. Ms. No.787 P.W.D. (EL), the State Government notified that the levy is merged with the tariff rate. But it should be noticed that there is no notification under The Electricity (Taxation on Consumption) Act, 1962, either suspending the operation of the Act or granting total exemption or relaxing the total relaxation of levy of duty.

58. Now it is fairly admitted that after the coming into force of the Electricity Regulatory Commission Act, 1988, the tariff rate is being fixed by the said authority, the State Electricity Regulatory Commission in exercise of powers conferred under Chapter V of the Act and in particular Section 22. Section 22 of the Act confers power on the State Commission to determine the tariff for electricity consumed. It is admitted that the State Commission has in exercise of powers conferred under the Act has passed the order under Section 29 of The Electricity Regulatory Commission Act, 1988 for all the categories of consumers notifying the tariff. A perusal of the Commission's tariff order, which is effective from 16.3.03 would show that tariff rate nowhere includes the element of tax or duty payable under The Tamil Nadu Electricity Duty Act, 1939 or The Tamil Nadu Electricity Taxation (on Consumption or Sale) Act, 1962. Therefore, the tariff rate is only the rate payable for the consumption of energy supplied by the Electricity Board in terms of The Electricity Regulatory Commission Act, 1988. Therefore, it is clear that the earlier merger pointed out by the counsel for the petitioners, vanishes and rates notified by the Regulatory Commission is the charges payable to the Electricity Board as on 16.6.2003 from which date The Tamil Nadu Act 12 of 2003 came into force. The tariff rate, as seen from the tariff order, nowhere include the element of duty or tax payable to the State nor such inclusion is permissible under The Electricity Regulatory Commission Act or Rules framed thereunder. Hence, the contention that it is a double taxation cannot be countenanced.

59. After the coming into force of the tariff order notified by the Regulatory Commission, in terms of the provisions of The Tamil Nadu Tax on Consumption or Sale of Electricity Act, tax has been levied on the consumption or sale of electricity. Therefore, it is clear that it is neither a double taxation nor it is an arbitrary levy. The earlier merger referred to by the counsel, as explained by the learned Advocate General appearing for the respondent, in my considered view, is duty as levied on the tariff rate charges payable by the consumer on the energy consumption at the rates that could be charged by the supplier, namely, Electricity Board. Therefore, the plea of double taxation or the levy is arbitrary has no legs to stand and such a contention is a misconception.

60. Repeatedly it was contended that there was a merger and, therefore, the State has to prove that there was a de-merger of the tax element and, hence it is a double taxation. This contention cannot be countenanced for the reasons stated above. The learned counsel appearing for the writ petitioners have to admit that charges are being collected as per the tariff order, which is effective from 16.3.03. There is no authority or power for the Electricity Regulatory Commission to include the element of tax in the

tariff rates in terms of statutory provision. Therefore, it follows that the contention advanced by the learned counsel appearing for the petitioners that the tariff rate already include duty or tax is without merit. As of today, under The Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, tax is levied on the charges actually consumed and rate for such consumption being as per the tariff order notified by the State Electricity Regulatory Commission.

61. At the risk of repetition, it has to be pointed out that the element of tax, admittedly, has not been taken into consideration nor included nor it could be included nor it could be the part of the tariff rates, in terms of The Electricity Regulatory Commission Act and the Rules framed therein. Hence, this contention has to necessarily fail.

62. While considering the effect of G.O.Ms.No:787, Public Works Department, dated 30.4.1979, a Division Bench of this Court in M/s. Navbharath Ferro Alloys Ltd., Ms.6 & others Vs. The State of T.N. rep. by the Secretary to Govt., PWD (Electricity) reported in 1997 Writ L.R. 201, and examining the levy in particular the basis for calculation of energy tax, held thus:-

"5. The contention is that in the event the revised tariff is also applied as clarified by the Chief Engineer, in his memo No.450/J2/70-2 dated 10.5.1979, the revised tariff effected under G.O.ms.No.787 P.W.D (Electricity) dated 30.4.1979 would include the tax whatever leviable, therefore the amount of tax payable on the tariff that prevailed prior to G.O.Ms.No.787 dated 30.4.1979 shall have to be excluded from the price of energy for the purpose of levying the energy tax. We are of the view that the energy tax payable by the captive energy consumers has to be determined not on the basis of the explanatory memo issued b the Chief Engineer. It is not explained as to under what authority he had issued such memo. Even without going into that question, we are of the view that what is relevant for the purpose of deciding the energy tax liability of the petitioners, who are using the captive energy produced by them, is the definition of the price of energy as per Sec.2(9), Sub sec. (2) of Sec.5 and Sec.3(1)(a) and (b) of the Tamil Nadu Act 4 of 1962. All these provisions, which have been referred to above, read together would make it clear that the tariff for the time being prevailing in force would be the price or the money consideration payable by the energy consumers. Whatever may be the contents of the tariff, as long as it answers the requirement of the definition of price of energy as meaning the money consideration paid by a consumer to a licensee, excluding items (i) to (iv) of Cl.(9) of Section 2 of the Tamil Nadu Act 4 of 1962 would be the price of energy therefore, we are of the view that it is not possible to accede to the contention of the petitioner that in the tariff revised by G.O.M.s.NO.787 dated 30.4.1979l the tax payable on the tariff as it stood prior to 1.5.1979 should be excluded for the purpose of determining the energy tax, because the said tax payable on the tariff has been made as part and parcel of the price or the money consideration payable by the energy consumer to the licensee.
6. The Tamil Nadu Act 1 of 1979 has been considered by a Division Bench of this Court (to which one of us the Hon'ble The Chief Justice, was a party) M/s.Snam Abrasives Ltd., rep, by its director T.V. Sivaraman, V. The

Commissioner and Secretary to the Government Public Works & Electricity Department and Others (ILR 1996) 2 Madras 501). In para 11 of the said decision, it has been held that Section 4 of the Act No.1 of 1979 gives power to the State Government to change the tariff schedule. The relevant portion of the judgment is as follows :-

"... When section 4 gives the power to change the Schedule, it goes without saying that the Government has the power to prescribe the rates different from what was prescribed under Act 1 of 1979 and in so doing they can equally prescribe a different rate for the industries which had been grouped, under Heading V. Special Tariff. Therefore, when the Tariff Schedule Act was first amended by G.O.Ms.NO.787 dated 30.4.1979 the fact that the Synthetic Gem Industry was levied at the rate of 20 Paise per KWH where as Caustic Soda, Calcium Carbine, Aluminum Fertiliser etc., were charged at the rate of 17 paise, 10 paise, 19 paise respectively per KWH cannot be faulted on the ground that a different classification had been adopted. We are clearly of opinion that only tariff rates as applicable to certain industries have been prescribed and this is perfectly legitimate and within the power of the Government under section 4 of the Act. In other words, Section 4 does give the power to the Government industries by amending the schedule and this is precisely what has been done in the various Government orders. The first contention of the appellants, therefore, fails....."

The explanatory note issued by the Chief Engineer, whose authority has not been explained to us, is not in conformity with the reasons for issuing G.O.ms.No.787 dated 30th April, 1979. In addition to that, as already pointed out the said explanatory note apart from being contrary to Section4 of Act 1 of 1979 the scope of which is explained in the aforesaid decision is not relevant for purpose of deciding the price of energy in relation to the captive energy produced by the consumers."

63. This answers the material contention advanced by the learned counsel for the petitioners. This court is bound by the Division Bench pronouncement of this Court. In the light of the above discussion, this point cannot be countenanced and is also answered in favour of the respondents.

64. In the result, all the points are answered against the petitioners and all the above writ petitions are dismissed. Consequently, connected miscellaneous petitions are also dismissed. The parties shall bear their respective costs.

Index : Yes
Internet : Yes

GLN

To

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